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LEGISLATIVE NOTE: DISPOSITION OF THE MENTALLY ILL OFFENDER IN ILLINOIS—"GUILTY BUT MENTALLY ILL"

Illinois does not impose criminal responsibility upon defendants who raise a reasonable doubt as to their sanity at the time of the crime for which they are charged.¹ Although the insanity defense has been the subject of much debate,² including proposals for its abolition,³ legislative attempts by states to eliminate the defense have been held unconstitutional.⁴

Criticism of the insanity defense has been two-fold. First, the defense fails to accurately separate the sane from the insane offender,⁵ and second, it often allows those found not guilty by reason of insanity to be released

1. See *People v. Redmond*, 59 Ill. 2d 328, 336-37, 320 N.E.2d 321, 326 (1974) (once defendant raises a reasonable doubt as to his sanity, no criminal responsibility will be imposed unless state proves beyond a reasonable doubt that defendant was sane). Illinois' insanity test, based upon the American Law Institute's Model Penal Code, was enacted within the Criminal Code of 1961 and provides:

(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

ILL. REV. STAT. ch. 38, § 6-2 (1981).

2. The issues of the validity and desirability of the insanity defense have been discussed at length by numerous authors. See, e.g., H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972) [hereinafter cited as FINGARETTE]; A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967) [hereinafter cited as GOLDSTEIN]; S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* (1967); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963); B. WOOTTON, *CRIME AND THE LAW* (1963); BRADY, *Abolish the Insanity Defense?—No!*, 8 HOUS. L. REV. 629 (1971); Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111 (1975); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973). For a detailed discussion of Illinois' approach to the insanity defense, see Thompson, *The Future of the Insanity Defense In Illinois*, 26 DEPAUL L. REV. 359 (1977) [hereinafter cited as Thompson].

3. Several proposals have been made to eliminate Illinois' insanity defense. See S.B. 61, 81st Gen. Assem., 1980 Sess. 2, ILL. LEGIS. SYNOPSIS & DIG. 18 (1981); deVito, *Should the Insanity Defense Be Eliminated?*, 11 ILL. ISSUES 12 (1980); Thompson, *supra* note 2, at 369-76.

4. See *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931) (statute prohibiting insanity as defense to murder violative of due process); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910) (statute prohibiting insanity as defense to assault violates due process). See also *Speidel v. State*, 460 P.2d 77 (Alaska 1969) (statute creating a felony is invalid to the extent that it eliminates conscious purpose to inflict injury or awareness of wrongdoing as requisite elements of criminal conduct).

5. See GOLDSTEIN, *supra* note 2, at 88-92. The author contends that inherent difficulty in developing a legal standard or rule that can make use of medical concepts to achieve social objectives and fix responsibility for criminal conduct in a manner acceptable to the public has resulted in inconsistent decisions and an inability to draw clear distinctions between sane and insane offenders. *Id.*

prematurely from custody, thereby jeopardizing the public's safety.⁶ Although a verdict of insanity rarely results in immediate freedom for the defendant,⁷ it has resulted in cases in which defendants, who were found not guilty by reason of insanity and later released from custody, went on to commit serious crimes.⁸ The Illinois legislature has responded to such incidents by enacting several amendments to the Criminal Code⁹ designed to protect the public from dangerous mentally ill offenders and to ensure adequate psychiatric treatment for these defendants.¹⁰

Illinois' most recent attempt to resolve the problem of the mentally ill offender is the enactment of the guilty but mentally ill amendments to the

6. See, e.g., *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970) (Task, J., dissenting) (adoption of A.L.I. test for insanity without a mandatory commitment statute may allow dangerous persons to go free); *State v. White*, 60 Wash.2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963) (tests such as the one proposed by the A.L.I. that consider the defendant's ability to control his behavior in the determination of insanity provide insufficient protection to society and do not deter crime). For examples of incidents where premature release of Illinois defendants resulted in injury to the public, see *infra* note 37.

7. Many states provide for the automatic commitment of insane defendants to mental hospitals. E.g., DEL. CODE ANN. tit. II, § 403(a) (1979); IDAHO CODE § 18-214(1) (Supp. 1980); KAN. STAT. ANN. § 22-3428(1) (1981). Courts have upheld such statutes against due process and equal protection attacks. See, e.g., *In re Lewis*, 402 A.2d 1115 (Del. 1979) (initial commitment and continued confinement of insanity acquittee in state hospital not violative of due process or equal protection despite less rigid commitment and stricter release procedures as compared with civil commitment); *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980) (statute providing for commitment of insanity acquittee for evaluation period not violative of due process and differences in procedures for civil committees and insanity acquittees not violative of equal protection); *State v. Kee*, 510 S.W.2d 477 (Mo. 1974) (en banc) (statute requiring commitment of defendant found not guilty by reason of a mental defect or disease without a hearing or a determination of fact that he suffered from the disease or defect at the time of commitment not violative of due process or equal protection); *People ex rel. Henig v. Commissioner of Mental Hygiene*, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977) (mandatory commitment statute which does not require a prior hearing but which allows the insanity acquittee to seek a hearing at any time to determine the validity of detention not violative of due process or equal protection). But see *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (criminal commitment must be constitutionally subject to judicial hearing under procedures similar to civil commitment); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) (automatic commitment for observation is constitutional but due process and equal protection require sanity hearing upon completion of observation); *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 219 N.W.2d 341 (1974) (finding of insanity without full hearing violates due process and equal protection), *cert. denied*, 419 U.S. 1130 (1975). For a general discussion concerning automatic commitment procedures for insane acquittees, see AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 404 (rev. ed. 1971) [hereinafter cited as AMERICAN BAR FOUNDATION]; S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 581 (2d ed. 1973); Note, *Commitment Following An Insanity Acquittal*, 94 HARV. L. REV. 605 (1981).

Although Illinois does not provide for the automatic commitment of defendants found not guilty by reason of insanity, recent amendments to the Correctional Code have virtually ensured their continued confinement. See ILL. REV. STAT. ch. 38, § 1005-2-4 (1981). For a discussion of these amendments, see *infra* note 44.

8. See *infra* notes 37 & 39 and accompanying text.

9. See *infra* notes 43-45 and accompanying text.

10. See *infra* notes 13-14 and accompanying text.

Criminal Code.¹¹ These amendments provide an alternative verdict to insanity; specifically, the verdict of guilty but mentally ill (GBMI). The GBMI amendments were enacted as a compromise to the elimination of the insanity defense.¹² Through the use of this alternative verdict the Illinois legislature intended to reduce the number of persons who were erroneously found not guilty by reason of insanity¹³ and to ensure appropriate psychiatric treatment for mentally ill defendants.¹⁴

After discussing the problems that prompted enactment of the GBMI amendments, this Note suggests that legally insane defendants may be deprived of their right to an insanity verdict due to the poorly conceptualized and confusing distinction between mental illness and legal insanity. Although the legislative objectives behind the GBMI amendments are valid, the GBMI alternative verdict fails to meet these objectives because of its ill-defined standards and illusory treatment rights for mentally ill offenders. Finally, after examining the statute's impact, proposed judicial measures, including a new jury instruction, are suggested as a means of aiding Illinois courts in fulfilling the statute's legislative purposes and remedying potential constitutional defects.

11. See ILL. REV. STAT. ch. 38, §§ 6-2, 6-4, 113-4, 113-5, 115-1 to -4, -6, 1005-2-5, -6 (1981).

12. MESSAGE BY GOVERNOR THOMPSON TO THE 82ND GEN. ASSEM., "TECHNICALITIES" IN THE CRIMINAL JUSTICE PROCESS: CLOSING THE LOOPHOLES THROUGH WHICH THE GUILTY ESCAPE (Apr. 23, 1981) [hereinafter cited as CLOSING THE LOOPHOLES]. See S.B. 61, 81st Gen. Assem., 1980 Sess. 2, ILL. LEGIS. SYNOPSIS & DIG. 18 (1981) (proposing the repeal of the insanity defense, ILL. REV. STAT. ch. 38, § 6-4 (1981)).

13. The excessive number of recent insanity verdicts was clearly disturbing to the Bill's sponsors. For example, Sen. Geo-Karis, while introducing the GBMI bill in the Senate, noted that, "many of these [insane defendants] who know what they're doing . . . are not thoroughly insane but go ahead and perpetrate vicious crimes upon people and get by with it." 82nd Illinois General Assembly, Senate Debate at 127 (May 27, 1981) (statement of Sen. Geo-Karis) [hereinafter cited as Senate Debate]. Another factor contributing to the enactment of the GBMI verdict was the media's critical examination of Illinois' release procedures for the insane. See *infra* notes 37 & 39 and accompanying text.

14. During debate there were repeated assurances from the Bill's sponsors that GBMI defendants would receive psychiatric treatment as part of their sentence. Sen. Geo-Karis, when explaining the difference between the guilty verdict and the GBMI verdict stated that "[a] guilty but mentally ill defendant can be . . . sentenced exactly as a healthy defendant . . . except that his sentence must include psychiatric and psychological treatment or counseling." Senate Debate, *supra* note 13, at 127 (May 27, 1981) (statement of Sen. Geo-Karis). Furthermore, while explaining the difference between the dispositions of GBMI and insane defendants, Sen. Sangmeister pointed out that "if you're guilty, but mentally ill . . . you're going to get committed to the Department of Mental Health and then you're going to come back after you're cured to serve out the rest of your sentence." *Id.* at 133 (statement of Sen. Sangmeister). See also HOUSE REPUBLICAN STAFF ANALYSIS REPORT, 82ND GEN. ASSEM., REPORT ON S.B. 867 2 (1981) (stating that the GBMI bill will create a "mechanism other than treatment/release for those falling within the consent [sic] of the current insanity defense"). The reason for this concern about adequate psychiatric treatment was most likely in response to the inadequate psychiatric care that had been afforded prisoners by Department of Corrections officials in the past. See *infra* note 38 and accompanying text.

BACKGROUND

The basic objectives of criminal law—retribution, deterrence, restraint, and rehabilitation—are not served by convicting and sentencing an insane offender.¹⁵ The retributive objective is not furthered because, due to the diminished mental capacity of the insane, the law does not consider them blameworthy.¹⁶ Similarly, imprisonment does not deter the insane from future antisocial behavior because they are not likely to fear sanctions due to their incapacity to appreciate the wrongfulness of their conduct.¹⁷ Furthermore, society's interest in restraining and rehabilitating the insane is better served through a medical-custodial disposition¹⁸ of the defendant rather than through penal confinement.¹⁹

Through the use of various insanity tests,²⁰ society seeks to separate from the criminal justice system persons whose penal confinement would not serve

15. See GOLDSTEIN, *supra* note 2, at 11; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 36 (1972) [hereinafter cited as LAFAVE & SCOTT]. The retribution theory holds that punishment is imposed on criminals to obtain revenge or to achieve justice by inflicting suffering upon one who has caused harm. Although generally criticized as morally indefensible, this theory retains some support as a measure to repress criminal tendencies and to maintain respect for the law. Under the deterrence theory, suffering is imposed upon criminals in order to deter the individual offender and the general public from engaging in similar behavior in the future. The theory underlying restraint is that the isolation of the dangerous offender will serve to protect society from possible future wrongdoing. The desire of society to reform rather than punish criminals forms the basis of the rehabilitation theory. Under this approach, punishment is viewed as treatment designed to modify individual behavior and prevent future crimes. GOLDSTEIN, *supra* note 2, at 11-14; LAFAVE & SCOTT, *supra*, at 271-72.

LaFave and Scott add education as a fifth objective of punishment. Under this theory, punishment serves to educate the public with respect to distinctions between proper and improper conduct in order that they may be better able to conform their conduct with the law. This is especially important for relatively minor crimes not widely known or understood. LAFAVE & SCOTT, *supra*, at 272.

16. See GOLDSTEIN, *supra* note 2, at 12; LAFAVE & SCOTT, *supra* note 15, at 272.

17. See GOLDSTEIN, *supra* note 2, at 12-14; LAFAVE & SCOTT, *supra* note 15, at 271.

18. Medical-custodial disposition refers to the process of involuntarily committing defendants found not guilty by reason of insanity to mental hospitals for treatment after their acquittals. This is commonly referred to as "criminal commitment." Involuntary hospitalization for other persons is referred to as "civil commitment." See Note, *Commitment Following An Insanity Acquittal*, 94 HARV. L. REV. 605 (1981).

19. LAFAVE & SCOTT, *supra* note 15, at 268.

20. The traditional tests of insanity are the "right-wrong" and "irresistible impulse" tests. The "right-wrong" test originated in 1843 in the famous *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). Under the *M'Naghten* test, a defendant is not criminally responsible if, at the time of the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or that the act was wrong. *Id.* at 720. The "irresistible impulse" test is often used to supplement the "right-wrong" test. GOLDSTEIN, *supra* note 2, at 67. The test requires a verdict of not guilty by reason of insanity if the defendant had a mental disease which kept him from controlling his conduct. *Id.* The first use of the irresistible impulse test in the United States was in *Commonwealth v. Rogers*, 48 Mass. 500 (1844). For further discussions of these insanity tests, see generally GOLDSTEIN, *supra* note 2, at 67-79; Keedy, *Irresistible Impulse As A Defense In Criminal Law*, 100 U. PA. L. REV. 956 (1952); Platt & Diamond, *The Origins of the "Right and Wrong" Test Of Criminal Respon-*

these basic objectives of criminal law.²¹ The difficulty in distinguishing between persons who should be subject to criminal disposition from those who should be subject to medical-custodial disposition has been problematic and generated extensive comment on,²² and revision of, the insanity tests.²³ An equally troubling problem has been the appropriate disposition of insane defendants.²⁴ The Illinois GBMI amendments are directed primarily at remedying these two problems;²⁵ however, before an examination of the amendments can proceed, an understanding of Illinois' general statutory scheme for dealing with mentally ill offenders is necessary.

In the past, the Illinois criminal²⁶ and mental health²⁷ codes proved to be effective vehicles for the involuntary confinement and treatment of men-

sibility and Its Subsequent Development in the United States: An Historical Survey, 54 CALIF. L. REV. 1227 (1966).

The modern tests are usually referred to as the "product" and "substantial capacity" tests. Although the "product" test originated in New Hampshire in 1871, see I. RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 39 (5th ed. 1871), the test first became popular in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). In *Durham*, the court articulated the rule that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect. *Id.* at 874-75. About a year after the *Durham* decision, the drafters of the American Law Institute's (ALI) Model Penal Code produced the "substantial capacity" test that consisted essentially of a revised version of the *M'Naghten* and irresistible impulse tests:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to either appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

Illinois adopted the *M'Naghten* "right-wrong" test in *Fisher v. People*, 23 Ill. 218, 229 (1859), and supplemented it with the "irresistible impulse" test in *People v. Lowhorne*, 292 Ill. 32, 48, 126 N.E.2d 620, 626 (1920). This test prevailed until the legislature adopted the "substantial capacity" test in the Criminal Code of 1961 which is still in effect today. ILL. REV. STAT. ch. 38, § 6-2 (1981).

21. GOLDSTEIN, *supra* note 2, at 9-22; LAFAYE & SCOTT, *supra* note 15, at 269.

22. See *supra* notes 2 & 3.

23. The best example of a court revising its insanity test is found in the District of Columbia Circuit Court. The court adopted the "product" test in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), modified it in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (en banc), and replaced it with the ALI "substantial capacity" test in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

24. See, e.g., *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) (automatic commitment following insanity verdict unconstitutional). See also Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 (1981) (arguing that more stringent release procedures for insane defendants than for civilly committed persons are not justified). See generally AMERICAN BAR FOUNDATION, *supra* note 7; A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974); LAFAYE & SCOTT *supra* note 15, at 317-25.

25. See *supra* notes 13 & 14 and accompanying text.

26. ILL. REV. STAT. ch. 38, §§ 1-1 to 1008-6-1 (1975). Because this discussion attempts to isolate procedures that directly led to amendments in the late 1970's, all references will be to the 1975 Code.

27. ILL. REV. STAT. ch. 91 1/2, §§ 1-1 to 20-1 (1975) (amended 1979).

tally ill offenders. For example, mentally ill offenders could be involuntarily committed to a mental hospital pursuant to the civil commitment statute.²⁸ Additionally, an offender scheduled for criminal prosecution could be found incompetent to stand trial and involuntarily committed.²⁹ At the trial stage, a defendant could be found innocent,³⁰ not guilty by reason of insanity,³¹ or guilty. A verdict of not guilty by reason of insanity did not provide immediate freedom to the defendant, however, unless the jury determined that he had "recovered from his insanity" at the time of the trial.³² If the jury found that the defendant had not recovered, the defendant was committed to the Department of Mental Health where he could not be released until he "no longer required mental health services."³³

In 1976, a commission authorized by Governor Walker recommended sweeping changes in the substantive and procedural rights of the mentally ill in Illinois.³⁴ The Commission also proposed specific revisions concerning

28. *Id.* §§ 6-1 to 9-13. Involuntary admission of an individual for up to 60 days could be obtained by anyone submitting a physician's certificate and asserting the person's "need for mental treatment." *Id.* §§ 6-1 & 6-6 (for a period of greater than 60 days a judicial hearing is required). If the patient did not request a judicial hearing within 60 days, the hospital superintendent was required to submit to the court a written statement setting forth the reasons for the continued detention. If the court was "satisfied" with the superintendent's report, it could order an indefinite commitment. *Id.* § 6-6. Involuntary commitment could also be obtained through a court order if any citizen filed a petition with the court asserting the person's need for mental treatment. If, after a hearing, the court determined that the person was in need of mental treatment, the person could be indefinitely committed to a mental hospital for care. *Id.* § 9-6. Finally, emergency admission was authorized up to five days when anyone alleged that another was in need of mental treatment and immediate hospitalization was necessary for the protection of that person or others. *Id.* § 7-1.

29. ILL. REV. STAT. ch. 38, § 1005-2-1 to -2-2 (1975) (repealed 1979). A defendant was incompetent to stand trial if because of a mental or physical condition he was unable to understand the nature and purpose of the proceedings against him or to assist in his defense. *Id.* § 1005-2-1(a). If the defendant was found incompetent to stand trial, the court was required to transfer him to the Department of Mental Health for a determination of whether he was subject to involuntary admission. *Id.* § 1005-2-2(a). If the Department of Mental Health determined that the defendant did not require hospitalization, he could be released after posting bond. *Id.* § 1005-2-2(b).

30. A mentally ill defendant who was found innocent would be released immediately, provided that the state could not successfully bring civil commitment proceedings pursuant to ILL. REV. STAT. ch. 91 1/2, § 7-1 (1975) (amended 1979). For a discussion of the civil commitment statute, see *supra* note 28.

31. ILL. REV. STAT. ch. 38, § 115-3(b) (1975) (amended 1981).

32. *Id.* at § 1005-2-4. If the jury determined that the defendant had not recovered from his insanity, the court was required automatically to commit the defendant to the Department of Mental Health for up to 12 months. During this period, mental health personnel were required to determine whether the defendant was subject to indefinite involuntary commitment under the Mental Health Code. *Id.* See also ILL. REV. STAT. ch. 38, § 115-3(b) (1975) (amended 1977 & 1979) (acquittal by reason of insanity required the jury specifically to state whether the defendant had recovered from his insanity).

33. ILL. REV. STAT. ch. 91 1/2, § 10-1 (1975) (amended 1979).

34. See GOVERNOR'S COMMISSION FOR REVISION OF THE MENTAL HEALTH CODE OF ILLINOIS

the disposition of those found incompetent to stand trial³⁵ or not guilty by reason of insanity.³⁶

While the Commission's recommendations were under consideration, two problems relating to the disposition of mentally ill offenders in Illinois were emphasized by the media. First, in various instances, defendants who had been found not guilty by reason of insanity were released prematurely by the Department of Mental Health and, thereafter, committed another crime.³⁷ Second, defendants whose mental illnesses did not constitute legal insanity were sentenced to prison without adequate psychiatric care.³⁸ Several of these media reports characterized the Department of Mental Health as the "weak link" in a system expected to provide both treatment for, and protection from, the mentally ill offender.³⁹

In response to the Commission's recommendations and media pressure, the legislature enacted a new Mental Health Code⁴⁰ and substantially amended

(1976) [hereinafter cited as 1976 COMMISSION]. For example, the Commission recommended more procedural protections for persons subject to involuntary commitment, *id.* at 13-16, the creation of the Office of the State Guardian to assume responsibility for patients without legal guardians, *id.* at 118-30, the creation of the Legal Advocacy Service to provide legal representation at every stage of the commitment process, *id.* at 142-49, and new rights of confidentiality for mental patients, *id.* at 163-75.

35. See 1976 COMMISSION, *supra* note 34, at 176-86. Many of the Commission's recommendations were subsequently enacted into law. See *infra* note 43.

36. GOVERNOR'S COMMISSION FOR REVISION OF THE MENTAL HEALTH CODE OF ILLINOIS (1977) 143-55 [hereinafter cited as 1977 COMMISSION]. These recommendations were subsequently enacted into law. See *infra* note 44. In addition, the Commission recommended judicial review of Department of Mental Health decisions to release defendants committed following an insanity verdict. 1977 COMMISSION, *supra*, at 4. Explaining this provision, the Commission noted:

The crucial question is how is [the determination of when insane defendants are no longer dangerous] to be made? The Commission considers judicial supervision of that decision to be essential. The Commission believes that the period of such judicial supervision should be related to the seriousness of the act involved as expressed in the sentence authorized by statute.

Id. at 47.

37. See, e.g., Gleick, *Getting Away With Murder*, NEW TIMES, Aug. 21, 1978, at 21-27 (citing several examples of subsequent killings committed by insane defendants recently released from mental hospitals); *Inmate: How To Beat Murder Rap By Insanity*, Waukegan News Sun, Apr. 15, 1978, at 3, col. 2 (defendant found not guilty by reason of insanity for killing a 15 year old and within one year after being released from a mental institution was charged with a second killing). See also CLOSING THE LOOPHOLES, *supra* note 12, at 7 (citing examples of Illinois defendants found not guilty by reason of insanity who were released and committed subsequent killings).

38. See, e.g., Stevens, *Patient Abuse Charged At Chester Mental Center*, Chi. Sun Times, Sept. 10, 1980, at 14, col. 1 (psychologist charged prison officials with abusing inmates due to inadequate physical and psychiatric care).

39. See, e.g., Fritsch, *Plan Off-Grounds Passes For Killer*, Chi. Trib., July 8, 1979, at 3, col. 1 (criticizing Department of Mental Health decision to offer off-grounds privileges to an insane defendant); Nicodemus & Rooney, *Agencies Pass The Buck Over Release Of a Killer*, Chi. Daily News, Oct. 29, 1976, at 4, col. 1 (Department of Mental Health blamed for release of insane defendant who killed after release).

40. See ILL. REV. STAT. ch. 91 1/2, §§ 1-100 to 100-120 (1981).

the existing Criminal Code.⁴¹ The new Mental Health Code provided many new substantive rights for the mentally ill,⁴² and the amendments to the Criminal Code protected the public from premature release of mentally ill offenders. For example, the amendments virtually guaranteed long-term confinement of anyone found incompetent to stand trial⁴³ and provided more stringent release procedures for defendants found not guilty by reason of insanity.⁴⁴ The most recent amendment to the Criminal Code provides the trier of fact with an alternative verdict form—guilty but mentally ill.⁴⁵

THE ILLINOIS GUILTY BUT MENTALLY ILL AMENDMENTS

Following the lead of Michigan⁴⁶ and Indiana,⁴⁷ the Illinois legislature

41. See *infra* notes 43-45 and accompanying text.

42. See, e.g., ILL. REV. STAT. ch. 91 1/2, § 2-102 (1981) (right to adequate and humane care in the least restrictive environment); *id.* § 2-103 (right to correspond by mail, telephone, or visitation); *id.* § 2-107 (right to refuse treatment); *id.* § 2-108 (right to be free of non-therapeutic restraint); *id.* § 2-110 (right to refuse electro-convulsive therapy). In regard to civil commitment procedures, the new Mental Health Code replaces the old "persons requiring mental treatment" standard with a more contemporary involuntary commitment standard. The Code now provides for involuntary commitment only if (1) a person is mentally ill and reasonably expected to inflict physical harm or (2) is unable to provide for his basic needs. *Id.* §1-119. The drafters of the new Code, however, intentionally omitted a definition of mental illness. This omission resulted primarily because the Commission had recommended that mental illness be left undefined as in prior codes, largely because any definition which could be made legally explicit would necessarily be so broad or circular as to preclude accurate application. By not providing an explicit statutory definition, a common law definition fashioned by the courts on a case-by-case basis is deemed to be preferable as it has been in the past.

1976 COMMISSION, *supra* note 35, at 14. Despite this recommendation, the legislature specifically attempted to define mental illness in the GBMI amendments. See ILL. REV. STAT. ch. 38, § 6-2(d) (1981). This definition is set out at *infra* note 50.

43. To establish a protective system for the disposition of defendants found incompetent to stand trial, the legislature enacted ILL. REV. STAT. ch. 38, §§ 104-10 to 104-29 (1981) (repealing ILL. REV. STAT. ch. 38, §§ 1005-2-1 & 1005-2-2 (1979)). This section allows for release of a non-committable, unfit defendant only if the state is unable to prove the defendant's guilt beyond a reasonable doubt. *Id.* § 104-25. If the state meets its burden of proof, the defendant may be confined for further treatment up to five years. *Id.* § 104-25(c) (2).

44. See ILL. REV. STAT. ch. 38, § 1005-2-4 (1981). The statute now requires the Department of Mental Health to classify the insane defendant within 30 days of the verdict as either (1) civilly committable, (2) not civilly committable but dangerous, (3) not civilly committable, not dangerous, but in need of out-patient mental care, or (4) not in need of mental health services. *Id.* § 1005-2-4(a)(1). The amendment provides statutory authority for courts to commit indefinitely insane defendants classified within the first two groups and to require out-patient treatment for defendants classified as being in need of out-patient care. *Id.* Furthermore, the amendment requires the criminal court to retain final authority over any decision to release insane defendants from the Department of Mental Health. This judicial authority extends up to the maximum period the defendant could have been sentenced if he had been convicted of the offense. *Id.* § 1005-2-4(b). Finally, any conflict between the criminal and mental health code standards are to be resolved in favor of the former. *Id.* § 1005-2-4(k).

45. See ILL. REV. STAT. ch. 38, §§ 6-2, -4, 113-4, -5, 115-1, -2, -3, -4, -6, 1005-2-5, -6 (1981).

46. See MICH. COMP. LAWS ANN. § 768.36 (Supp. 1981). The sponsors of Illinois' GBMI

enacted the GBMI amendments to the Illinois Criminal Code to resolve the serious problems in the administration of the insanity defense.⁴⁸ As a result of this enactment, the Illinois legislature for the first time has distinguished the concepts of legal insanity, which is defined as the inability to appreciate the criminality of one's acts,⁴⁹ and mental illness, which is now defined as a "substantial disorder of thought, mood or behavior . . . which impaired that person's judgment . . ."⁵⁰ at the time of the offense. Distinguishing

statute acknowledged the apparent success of Michigan's statute as support for the Illinois bill. Senate Debate, *supra* note 13, at 129 (statement of Sen. Sangmeister). The Michigan statute was the first GBMI statute in the United States and was enacted in response to the Michigan Supreme Court's decision in *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974). In *McQuillan*, the court held it unconstitutional to commit insane defendants to mental hospitals absent commitment and release provisions equal to those available to persons civilly committed. *Id.* at 547, 221 N.W.2d at 586.

The Michigan GBMI statute has been the subject of considerable comment. See Brown & Wittner, *1978 Annual Survey Of Michigan Law*, 25 WAYNE L. REV. 335 (1979) (includes detailed legislative history of Michigan GBMI statute and possible constitutional challenges); Hoek, *1980 Annual Survey Of Michigan Law*, 27 WAYNE L. REV. 657 (1981) (includes analysis of *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980), the decision upholding the GBMI statute and an examination of several unsettled constitutional challenges); Robey, *Guilty But Mentally Ill*, 6 BULL. AM. ACAD. PSYCHIATRY AND LAW 374 (1978) (includes statistical analysis of Michigan's mental health and criminal systems and supports the GBMI statute due to its probationary provisions); Schwartz, *Moving Backward Confidently*, 54 MICH. ST. B. J. 847 (1975) (criticizes GBMI statute's failure to mitigate culpability) [hereinafter cited as Schwartz]; Thompson, *supra* note 2 (criticizes statute because it allows determination of sanity to remain with jury); Watkins, *Guilty But Mentally Ill: A Reasonable Compromise For Pennsylvania*, 85 DICK. L. REV. 289 (1981) (supports GBMI statute and recommends its enactment in Pennsylvania); Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351 (1979) (recommends that GBMI and diminished capacity concepts be used conjunctively with insanity defense) [hereinafter cited as *Aggregate Approach*]; Comment, *Guilty But Mentally Ill: An Historical And Constitutional Analysis*, 53 J. URB. L. 471 (1976) (outlines Michigan commitment statutes and court decisions that led to GBMI statute concluding that statute is constitutional with proper jury instructions) [hereinafter cited as *Guilty But Mentally Ill*]; Note, *The Constitutionality Of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188 (1978) (argues Michigan GBMI statute deprives insane of due process right to an insanity verdict) [hereinafter cited as *Constitutionality*]; Note, *Michigan's Revised Mental Health Code*, 9 U. MICH. J.L. REF. 620, 645-48 (1976) (argues purpose of GBMI statute is punitive, not rehabilitative) [hereinafter cited as *Mental Health Code*].

47. See IND. CODE ANN. § 35-36-2-1 to 35-36-2-5 (Burns Supp. 1982). Section 35-36-2-3 incorporates the guilty but mentally ill alternative. Section 35-36-2-5 provides that a GBMI defendant will be sentenced as if found guilty and, further, that psychiatric treatment shall be administered.

48. See ILL. REV. STAT. ch. 38, §§ 6-2, 6-4, 113-4, 113-5, 115-1, 115-2, 115-3, 115-4, 115-6, 1005-2-5, 1005-2-6 (1981). See also *supra* notes 13 & 14 and accompanying text.

49. For Illinois' definition of legal insanity, see *supra* note 1.

50. See ILL. REV. STAT. ch. 38, § 6-2(d) (1981). This section provides:

For purposes of this Section, "mental illness" or "mentally ill" means a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior

these concepts is crucial because the GBMI defendant, unlike the insane defendant, is not relieved of criminal responsibility and may be sentenced to prison just as if he had been found guilty.⁵¹

The GBMI amendments to the Illinois Criminal Code provide for the alternative verdict of GBMI to be submitted to the jury⁵² whenever a defendant raises the affirmative defense of insanity.⁵³ Once the defense is raised, the burden of proof shifts to the state to establish the defendant's sanity beyond a reasonable doubt.⁵⁴ Before the jury can return a GBMI verdict, however, the jury must be convinced beyond a reasonable doubt that the defendant committed the act with which he has been charged and was not legally insane, but was mentally ill, at the time the act was committed.⁵⁵

In addition to making available the alternative verdict form of GBMI, the amendments also permit a defendant to enter a plea of GBMI which is similar to a guilty plea in that all trial rights are waived.⁵⁶ The court,

or is unable to conform his conduct to the requirements of law.

Id.

It is interesting to note that Michigan's GBMI statute defines mental illness as "a substantial disorder of thought or mood which afflicted a person at the time of the offense, and which significantly impaired such person's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MICH. STAT. ANN. § 330.1400 (West 1980). Although the Illinois GBMI bill was introduced with Michigan's definition intact, in order to gain support of the Illinois Psychiatric Institute, Illinois' definition was amended to adopt the Institute's definition of mental illness. See Senate Debate, *supra* note 13, at 127 (statement of Sen. Geo-Karis).

51. See ILL. REV. STAT. ch. 38, § 6-2(c) (1981) (if defendant was mentally ill but not insane at the time of the offense he is criminally culpable); *id.* § 1005-2-6(a) (court may impose sentence upon GBMI defendant as if he had been found guilty).

52. See ILL. REV. STAT. ch. 38, § 115-4(j) (1981). The statute requires the judge to provide the jurors with the special verdict form of GBMI when warranted by the evidence. Because the amount of evidence needed to warrant an insanity instruction is at least equal to the amount needed for a GBMI instruction, logic suggests that whenever the court gives the insanity instruction, it must also instruct the jury as to the GBMI verdict. See *People v. Rone*, 109 Mich. App. 702, 711, 311 N.W.2d 835, 839 (1981) (GBMI instruction warranted whenever evidence is sufficient to give insanity instruction); *People v. Ritsema*, 105 Mich. App. 602, 610, 307 N.W.2d 380, 384 (1981) (error to omit GBMI instruction even if defendant requests its omission).

53. ILL. REV. STAT. ch. 38, § 6-4 (1981), specifically includes the defense of insanity as an affirmative defense. The significance of this classification is that the state is not required to prove sanity as an element of the crime unless the defendant introduces evidence of insanity at trial. When the defendant's evidence raises a "reasonable doubt" as to whether he was sane, the burden of proof shifts to the state to prove beyond a reasonable doubt that the defendant was sane. See, e.g., *People v. Redmond*, 59 Ill. 2d 328, 337, 320 N.E.2d 321, 326 (1974) (defendant had produced "some evidence" of insanity, but it was insufficient to raise the "reasonable doubt" required to shift the burden of proof).

The GBMI statute specifically states that mental illness is not an affirmative defense but rather an alternative verdict. ILL. REV. STAT. ch. 38, § 6-4 (1981). Presumably, the burden of proving mental illness would fall upon the state. See *infra* note 74.

54. See *People v. Redmond*, 59 Ill. 2d 328, 337, 320 N.E. 2d 321, 326 (1974); ILL. REV. STAT. ch. 38, § 104-11 (1981).

55. See ILL. REV. STAT. ch. 38, § 115-4(j) (1981).

56. See *id.* § 2-115-2(b).

however, cannot accept the defendant's plea until it has examined a mental report, held a hearing, and satisfied itself that a factual basis exists for believing that the defendant was mentally ill at the time of the offense.⁵⁷

If a verdict or plea of GBMI occurs, the amendments also provide greater sentencing discretion for courts⁵⁸ and new treatment opportunities for GBMI defendants.⁵⁹ Following a pre-sentence hearing, the court may sentence the defendant to probation, periodic imprisonment,⁶⁰ or conditional discharge⁶¹ with the requirement that the defendant participate in a court ordered treatment plan.⁶² The court's plan must reasonably assure both satisfactory progress of the defendant's mental treatment and safety for the public.⁶³ Failure to continue in the treatment plan will subject the defendant to revocation of these discretionary sentences.⁶⁴

Alternatively, the court may sentence the GBMI defendant as if he had been found guilty of the offense.⁶⁵ If sentenced to prison, however, the amendments require prison officials to review the defendant's need for treatment and to provide either the mental treatment they deem "necessary" or to transfer him to the Department of Mental Health.⁶⁶ Assuming a transfer of the defendant occurs, if treatment at the Department of Mental Health

57. See *id.* Section 2-115-2(b) provides:

(b) Before or during trial a plea of guilty but mentally ill may be accepted by the court when:

(1) the defendant has undergone an examination by a clinical psychologist or psychiatrist and has waived his right to trial; and

(2) the judge has examined the psychiatric or psychological report or reports; and

(3) the judge has held a hearing, at which either party may present evidence on the issue of the defendant's mental health and, at the conclusion of such hearing, is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense to which the plea is entered.

58. Compare ILL. REV. STAT. ch. 38, § 1005-2-6(e) (1981) (all GBMI defendants eligible for probation regardless of the offense committed) with ILL. REV. STAT. ch. 38, § 1005-8-1 (1981) (mandatory statutory minimum and maximum sentences for defendants found guilty of particular felonies). See *infra* notes 111-16 and accompanying text.

59. Compare ILL. REV. STAT. ch. 38, § 1005-2-6(b) (1981) (prison officials shall review and treat GBMI defendant's mental illnesses) and ILL. REV. STAT. ch. 38, § 1005-2-6(e)(2) (1981) (court shall reasonably assure GBMI defendant's satisfactory progress in treatment) with ILL. REV. STAT. ch. 38, § 1003-8-5(a) (1981) (prison officials required to provide psychiatric treatment only if non-GBMI prisoner is subject to involuntary admission under the Mental Health Code). See *infra* notes 117-24 and accompanying text.

60. Periodic imprisonment refers to temporary confinement of an individual at regular intervals, for example, nights and weekends. See ILL. REV. STAT. ch. 38, §§ 1005-7-1 to -7-8 (1981).

61. Conditional discharge is a sentence of revocable release without probationary supervision but subject to conditions the court may impose. See *id.* § 1005-4.

62. *Id.* § 1005-2-6(e)(1).

63. *Id.* § 1005-2-6(e)(2). This section provides for family supervision, community adjustment programs, outpatient care, and periodic checks with legal authorities as some of the conditions available to ensure the defendant's care and the public's safety while on probation.

64. *Id.* § 1005-2-6(e)(3).

65. See *id.* § 1005-2-6(a).

66. *Id.* § 1005-2-6(c).

is successful, the defendant must be returned to prison to serve the remainder of his sentence.⁶⁷ On the other hand, if treatment is unsuccessful the defendant may be committed to the Department of Mental Health providing he meets the requirements of involuntary commitment under the Mental Health Code.⁶⁸

CRITICISM

Despite the Illinois legislature's commendable attempt to address the problems inherent in dealing with the mentally ill offender, the GBMI amendments fail to adequately alleviate these problems. First, the GBMI verdict may effectively deprive some legally insane defendants of their statutory,⁶⁹ if not constitutional,⁷⁰ right to an insanity verdict. This potential for the deprivation of the insanity verdict results from the poorly conceptualized distinction between mental illness and legal insanity which may yield jury confusion and promote compromise verdicts.⁷¹

To illustrate, an erroneous finding of GBMI is likely to result because the jury often will be unable to distinguish the conceptually overlapping defini-

67. *Id.* § 1005-2-6(d)(1).

68. *See id.* § 1005-2-6(d)(2).

69. *See id.* § 6-2. A defendant has a statutory right to an insanity verdict if he lacked substantial capacity to appreciate the criminality of his actions or is unable to conform his conduct to the law. *Id.*

70. Although the Supreme Court has never clearly stated that an insanity defense is constitutionally required, all legislative attempts to eliminate the defense have been ruled unconstitutional. *See supra* note 4. For a detailed argument supporting the proposition that insane defendants have a due process right to an insanity verdict, see *Constitutionality, supra* note 46, at 191-95.

71. In order to successfully challenge a conviction on this basis, a defendant would be required to show that the GBMI verdict form caused the jury to erroneously find him GBMI instead of not guilty by reason of insanity. Alternatively, GBMI defendants could contend that the statute deprives them of their right to have the jury accurately instructed on the applicable law of the case because of the confusion likely to be caused by the GBMI alternative verdict form. The Illinois Supreme Court has stated that "[a] defendant is entitled to have the jury so instructed that it may not become confused as to what constitutes the issue before it, and were it to appear that such confusion might reasonably arise, the giving of such an instruction would constitute error." *People v. Schyman*, 374 Ill. 292, 297, 29 N.E.2d 270, 273 (1940). *Accord* *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975) (confusion concerning exact definition of "wrongfulness" contained within insanity test constituted reversible error); *People v. Foster*, 23 Ill. App. 3d 559, 319 N.E.2d 522 (1974) (seemingly contradictory instruction concerning the criminal responsibility of intoxicated defendants so confused and misled the jury as to constitute reversible error). *But cf.* *People v. Thomas*, 96 Mich. App. 210, 292 N.W.2d 523 (1980) (Michigan's definition of mental illness sufficiently distinguishes between concepts of insanity and mental illness). Despite the holding in *Thomas*, the Michigan definition of mental illness has been criticized due to its potential for confusing jurors. *See* Hoek, *supra* note 46, at 675-76; Schwartz, *supra* note 46, at 849; *Guilty But Mentally Ill, supra* note 46, at 488-89; *Constitutionality, supra* note 46, at 195-98. *But see Aggregate Approach, supra* note 48, at 374-76 (distinctions between insanity and mental illness are no more vague than the reasonable man standard of tort law).

tions of legal insanity and mental illness.⁷² In the insanity instruction, jurors are told that they must return a verdict of not guilty by reason of insanity if they have a reasonable doubt as to whether the defendant suffered from a mental disease or mental defect that resulted in his inability to appreciate the criminality of his conduct or to conform to the law's requirements.⁷³ In the GBMI instruction, however, jurors are told that they must return a verdict of GBMI if they find beyond a reasonable doubt⁷⁴ that the defendant committed the offense while suffering from a "substantial disorder of thought, mood, or behavior . . ." that impaired his judgment. It is difficult, at best, for even a sophisticated juror to discern the fine distinction between these two definitions.⁷⁶

In addition to being confused, jurors are likely to compromise and find an insane defendant GBMI in an effort to ensure both treatment for the

72. Compare ILL. REV. STAT. ch. 38, § 6-2 (1981) (insanity defined as suffering from a mental disease and lacking substantial capacity to appreciate criminality of the act) with ILL. REV. STAT. ch. 38, § 6-2(d) (1981) (mental illness defined as suffering from a "substantial disorder" that impairs judgment).

73. ILL. PATTERN JURY INSTRUCTIONS 24-25:01 (1981).

74. Although GBMI excludes mental illness as an affirmative defense, it does require the jury to be convinced beyond a reasonable doubt that the defendant was mentally ill before returning a verdict of GBMI. ILL. REV. STAT. ch. 38, § 115-4(j) (1981). Presumably, the burden of proof would be upon the state to prove mental illness. Thus, although GBMI is not an affirmative defense, with respect to the placement of the burden of proof, it is treated as if it were. One defense lawyer remarked, however, that because proving mental illness is a prerequisite to a successful insanity defense, the GBMI amendments now require the defendant to aid the state by proving one element of the crime, namely, mental illness. Telephone interview with Lorna E. Propes, Chicago Attorney (Mar. 5, 1982).

75. ILL. REV. STAT. ch. 38, § 6-2(d) (1981). Essentially, before returning a verdict of GBMI, the jury must be convinced beyond a reasonable doubt that the defendant was sane *and* mentally ill at the time of the offense.

76. Not only did the legislature add more confusion to an already extremely perplexing decision for jurors, but it also ignored better alternatives that would have furthered the legislature's purpose of reducing the number of erroneous insanity verdicts. Under present law, the burden of proof is placed upon the state to prove beyond a reasonable doubt that the defendant was sane at the time of the offense. See *supra* note 1. At the conclusion of the evidence, the jury must find the defendant not guilty by reason of insanity if it has reasonable doubt as to the defendant's sanity. See ILL. PATTERN JURY INSTRUCTIONS 24-25:01 (1981). Because of the high degree of proof required to find a mentally ill defendant legally sane, many defendants, may erroneously be found not guilty by reason of insanity merely because the state was unable to meet its burden of proof. Instead of creating an alternative verdict of GBMI, the legislature could simply have followed other states and the District of Columbia and required that the defendant prove his insanity by a preponderance of the evidence. See, e.g., *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974); *Ruffin v. State*, 50 Del. 83, 123 A.2d 461 (1956). See also Note, *Constitutional Limitations On Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499, 503-04 (1976) (listing 22 states that place the burden of proving insanity by a preponderance of the evidence upon the defendant). Shifting the burden of proving insanity to the defendant would reduce the number of erroneous insanity verdicts without requiring the jury to make the near impossible distinction between definitions of legal insanity and mental illness.

defendant and protection for society. This compromise may occur for several reasons. First, when presented with multiple verdicts, jurors frequently attempt to find "middle ground" rather than fully debate the defendant's guilt or innocence.⁷⁷ Second, studies suggest that jurors commonly focus on the sanction which will be imposed upon a defendant as a result of a particular verdict.⁷⁸ In Illinois, jurors may be reluctant to find a defendant insane because they are not informed as to the defendant's disposition after a verdict of not guilty by reason of insanity, thus, their preconceived ideas concerning Illinois' release procedures for the insane may prejudice their ultimate finding.⁷⁹ This reluctance, coupled with the natural desire to ensure psychiatric treatment for mentally ill defendants, may encourage the jury to find a defendant GBMI despite having a reasonable doubt as to the defendant's sanity.

In addition to depriving some legally insane defendants of an insanity verdict, the GBMI statute may deprive a defendant of a due process right to a hearing because it permits a jury to infer that the defendant is mentally ill at the time of sentencing based upon a finding that the defendant was mentally ill at the time of the offense.⁸⁰ As a result, a defendant is labeled mentally ill and may be subjected to intrusive psychiatric treatment based solely upon the jury's finding that mental illness was present at the time of the offense.⁸¹ Many courts, when faced with committing defendants found not guilty by reason of insanity, have held that this presumption of continued mental illness between the time of the offense and trial is irrational

77. See *Price v. Georgia*, 398 U.S. 323, 331 (1970) (charge of a greater offense may induce verdict of lesser offense without full debate as to the defendant's innocence); *United States v. Harary*, 457 F.2d 471, 479 (2d Cir. 1972) (if jury is unsure on issue of guilt, they may convict of lesser offense instead of fully debating defendant's innocence); *R. Simon, The Jury and the Defense of Insanity* 178 (1967) (based on concern for the accused, juries prefer middle ground between acquittal and guilty verdict). One commentator has suggested that the GBMI verdict is exactly the type of "middle ground" jurors prefer. See *Constitutionality*, *supra* note 46, at 196-98.

78. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 178 (1967).

79. The Illinois Supreme Court has declared that the jury should not be instructed as to the disposition of the defendant upon a verdict of not guilty by reason of insanity. *People v. Moor*, 355 Ill. 393, 400, 189 N.E.2d 318, 321 (1934). Accordingly, it is not surprising that jurors are naturally reluctant to return a verdict of insanity given the manner in which the media has reported on insane defendants who were prematurely released. See *supra* notes 37 & 39.

80. See ILL. REV. STAT. ch. 38, § 6-2(d) (1981) (mental illness is to be determined at the time of the commission of the offense).

81. Many courts hold that civil commitment procedures that subject persons to involuntary psychiatric treatment invoke a fundamental liberty interest to be balanced against the state's interest. See, e.g., *Vitek v. Jones*, 445 U.S. 480 (1980) (commitment to mental hospital is curtailment of liberty requiring due process protection); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) (persons subject to civil commitment must be afforded least restrictive treatment alternative); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979) (involuntarily confined mental patients have due process right to minimally adequate treatment). See generally R. SCHWITZGEBEL, *LAW AND PSYCHOLOGICAL PRACTICE* (1980) (author reviews various state statutes and court decisions articulating a patient's right to refuse treatment); Rhoden, *The Right To Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363 (1980) (author argues that "competent" mental patients should enjoy an absolute right to refuse psychotropic medication); Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients*

and unwarranted and, thus, violative of an insane defendant's due process rights.⁸² An equally compelling argument can be made that a GBMI defendant, despite his conviction, enjoys a similar due process right to a hearing to determine his present mental condition and his need for treatment at the time of sentencing.

Further, the Supreme Court recently held that prisoners have a due process liberty interest in not being erroneously labeled mentally ill and involuntarily subjected to various intrusive forms of psychiatric therapy without the due process protection of a hearing to determine their present need for mental treatment.⁸³ Under this analysis, a defendant found GBMI could contend that the statute's use of a presumption of continued mental illness subjects him to the possibility of intrusive forms of psychiatric therapy without the due process protection of a hearing to determine his present need for such treatment.

Ironically, it is unlikely that a GBMI defendant sentenced to prison will be in a position to complain of unwarranted psychiatric treatment because the GBMI amendments clearly fall short of the goal of ensuring adequate psychiatric care for defendants after conviction. Once a defendant is transferred to the Department of Corrections, his opportunities for psychiatric care are solely within the discretion of prison officials as they "determine necessary."⁸⁴ The failure to ensure adequate psychiatric care is primarily due to the excessive discretion afforded prison officials who have historically been unable to provide adequate psychiatric care for mentally ill prisoners.⁸⁵ In-

To Refuse Treatment, 83 W. VA. L. REV. 375 (1981) (author concludes that although patients should not have an absolute right to refuse treatment, the state should be compelled to render treatment in the least restrictive setting).

82. See *Bolton v. Harris*, 395 F.2d 642, 651 (D.C. Cir. 1968) (commitment of defendants found not guilty by reason of insanity permissible only for period required to determine their present mental condition); *People v. McQuillan*, 392 Mich. 511, 537, 221 N.W.2d 569, 577 (1974) (striking Michigan's automatic commitment statute for insane defendants as violative of the equal protection and due process clauses); *State ex. rel Kovach v. Schubert*, 64 Wis. 2d 612, 622-23, 219 N.W.2d 341, 346-47 (1974) (automatic commitment of persons found not guilty by reason of insanity violates equal protection clause), *cert. denied*, 419 U.S. 1130 (1975). *But see In re Lewis*, 403 A.2d 1115, 1118 (Del. 1979) (equal protection does not require same commitment procedures for insane defendants and civil committees).

Some states, by statute, require the court specifically to find that the defendant is mentally ill at the time of sentencing before commitment. See, e.g., CAL. PENAL CODE § 1026(a) (West Supp. 1980); ORE. REV. STAT. § 161.329 (1979); VA. CODE § 19.2-181(I) (Supp. 1980).

83. *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the Court held that prisoners have a due process right to a hearing to determine their present need for mental treatment before prison officials can involuntarily transfer them to mental hospitals. Although acknowledging that prisoners enjoy considerably less rights than persons subject to civil commitment, the Court reasoned that the "stigmatizing consequences" of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that require procedural protections. *Id.* at 486.

84. See ILL. REV. STAT. ch. 38, § 1005-2-6(b) (1981).

85. It is indeed ironic that the legislature gave the Department of Corrections the additional responsibility of treating mentally ill offenders when Illinois prisons are presently so overpopulated that inmates are prematurely released to attempt to maintain minimum custodial standards re-

deed, the dubious treatment opportunities for GBMI defendants sentenced to prison greatly undermine the legislature's objectives⁸⁶ and the jury's intentions in finding a defendant GBMI. Because of the tremendous discretion given to prison officials, the GBMI defendant has little assurance that he will be provided meaningful psychiatric care within the Department of Corrections.

In addition to not receiving adequate psychiatric care in prison, the GBMI defendant who is transferred to the Department of Mental Health for treatment is provided little incentive for improvement. This is due to the fact that a GBMI defendant, unlike a defendant found not guilty by reason of insanity, is immediately returned to prison after he recovers from his mental illness.⁸⁷ The release procedures for insane defendants, however, provide for the conditional release of these defendants from the Department of Mental Health when the court determines that they are no longer dangerous.⁸⁸

Although these conditional release procedures are new and have not yet been tested adequately, they appear to protect society from dangerously insane defendants without requiring a defendant to serve an extended prison term after successful mental treatment. Moreover, these release procedures further the legislature's objective of providing incentive for the mentally ill offender to cooperate with mental health personnel during treatment. Thus, the Illinois legislature, without acknowledging the recently amended release procedures for insane defendants,⁸⁹ may have needlessly provided for the continued institutionalization of non-dangerous, mentally ill offenders who will have little incentive to cooperate with treatment because of the inability to obtain an early release.⁹⁰

quired by the Constitution. See *Chi. Sun Times*, Mar. 25, 1981, at 14, col. 1 (early release of prisoners).

Although the GBMI amendments require the Department of Corrections to "cause periodic inquiry and examination . . . concerning the nature, extent, continuance, and treatment of the defendant's mental illness," the statute allows the Department of Corrections to provide such treatment "as it determines necessary." *Id.* Furthermore, it is wholly within prison official's discretion to transfer the defendant to the Department of Mental Health for treatment. *Id.* § 1005-2-6(c) (1981).

86. See *supra* note 14.

87. Compare ILL. REV. STAT. ch. 38, § 1005-5-2-6(d)(1) (1981) (GBMI defendant returned to prison after successful treatment) with ILL. REV. STAT. ch. 38, § 1005-2-4 (1981) (insane defendant eligible for conditional release when court determines defendant is neither mentally ill nor dangerous).

88. Conditional release is a process by which GBMI defendants may be released from custody subject to such restrictions as the court shall impose to reasonably insure defendants' progress and society's safety. ILL. REV. STAT. ch. 38, § 1005-2-4 (1981). See *id.* See also *supra* note 44 (discussing release procedures and standards).

89. Although both the Governor's Message and Senate debates cite several examples of insane defendants prematurely released under the old commitment standard, neither the Governor nor the Senate mentioned the recently amended insanity release procedures in relation to the GBMI enactment. See Senate Debate, *supra* note 13, at 93-160; CLOSING THE LOOPHOLES *supra* note 12.

90. In addition to the possible excessive incarceration of non-dangerous offenders, the GBMI amendments fail to provide for confinement of these defendants beyond their prison terms

IMPACT

The GBMI amendments will likely decrease the percentage of insanity verdicts in Illinois. Furthermore, it will create new pre-trial procedures, evidentiary issues, and sentencing options for criminal courts. Finally, it provides statutory authority for prison officials to treat mentally ill prisoners.

Fewer Insanity Verdicts

The percentage of insanity verdicts in Illinois is likely to decrease as a direct result of the GBMI amendments. The impact resulting from the enactment of a similar GBMI verdict alternative in Michigan supports this conclusion. After Michigan enacted its GBMI statute, the percentage of insanity verdicts decreased from 8.4 percent in 1976 to 6.1 percent in 1982,⁹¹ not-

if they remain dangerous. If the GBMI defendant's sentence expires while he is being treated for his illness, he must be released unless his mental illness is sufficient to require involuntary commitment under the Mental Health Code. ILL. REV. STAT. ch. 38, § 1005-5-2-6(d)(1) (1981). The Mental Health Code requires a finding of both mental illness and dangerousness before a person may be involuntarily committed. ILL. REV. STAT. ch. 91 1/2, § 1-119 (1981). See *supra* note 44. Commitment procedures of this nature previously have failed to ensure that defendants remain confined as long as they are dangerous. See *supra* notes 37 & 39.

Conversely, if the defendant is found insane, the amended release procedures provide authority for courts to ensure the defendant's continued confinement as long as he is reasonably likely to inflict physical harm upon himself or others. ILL. REV. STAT. ch. 38, § 1005-2-4 (1981). Thus, although the legislature was responding to the premature release of insane defendants when it enacted the GBMI statute, it may have hampered courts in their efforts to protect society from dangerous offenders.

Although the Illinois Supreme Court has not ruled on the constitutionality of the more stringent release procedures for insane defendants than for persons civilly committed, it is interesting to note that the Michigan Supreme Court struck down a similar distinction as violative of an insane defendant's equal protection rights. See *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974). It was this *McQuillan* decision, as well as the subsequent release of hundreds of defendants from mental hospitals, that served as the impetus behind the enactment of Michigan's GBMI statute. See *Guilty But Mentally Ill*, *supra* note 46, at 483; *Constitutionality*, *supra* note 46, at 188.

91. For the years 1976-1982 the Michigan Center For Forensic Psychiatry (CFP) reports:

Year	Number of defendants pleading not guilty by reason of insanity	Number of defendants found insane	Percentage of defendants found insane	Number of defendants found GBMI & sentenced to prison
1976	378	32	8.4%	
1977	561	47	8.3%	
1978	746	51	6.8%	114*
1979	948	68	7.1%	
1980	1122	64	5.7%	29
1981	1082	54	5.0%	37
1982	1060	65	6.1%	33

*from Aug. 5, 1975 to Dec. 31, 1979.

Telephone interview with Lynn Blunt, M.D., Staff Psychiatrist at the Michigan Center For Forensic Psychiatry (Jan. 24, 1983). See Robey, *supra* note 46, at 380 (rate of insanity acquittals decreased between August 5, 1975 and June 1, 1978 as a result of the GBMI statute).

withstanding the fact that a greater number of defendants raised the insanity defense.⁹² Many commentators attribute this decrease in the percentage of insanity verdicts to the confusion caused by the poorly conceptualized distinction between mental illness and legal insanity.⁹³ Although the Illinois legislature drafted a new definition of mental illness,⁹⁴ it failed to clarify the confusing distinction between mental illness and legal insanity and, in fact, may have compounded the problem.⁹⁵ Therefore, a reasonable inference can be made that a decrease in the percentage of insanity verdicts will result in Illinois due to this confusing distinction.

The potential decrease in the percentage of insanity verdicts that may result from jury confusion and compromise is illustrated by examining Illinois' first GBMI verdict in *People v. DeWit*.⁹⁶ In *DeWit*, the defendant was charged with murder and raised the affirmative defense of insanity. Judge Cieslik read the standard insanity instruction,⁹⁷ and further informed the jury that, "[a] person is guilty but mentally ill if at the time of the commission of an offense he was not insane but was suffering from a mental illness."⁹⁸ This was followed by a verbatim reading of the statutory definition of mental illness.⁹⁹

The jury's confusion, when presented with the seemingly contradictory GBMI and insanity definitions, was evident from the fact that the jury foreman returned a note to Judge Cieslik requesting assurance that finding

92. The increase in insanity pleas was nearly threefold between 1976 and 1982. Telephone interview with Lynn Blunt, M.D., Staff Psychiatrist at the Michigan Center For Forensic Psychiatry (Jan. 24, 1983).

93. Before these figures were available, commentators predicted that the confusing definitions would result in fewer insanity verdicts. See Hoek, *supra* note 46, at 675; Schwartz, *supra* note 46, at 848-49; *Aggregate Approach*, *supra* note 46, at 374-76; *Guilty But Mentally Ill*, *supra* note 46, at 492-93; *Constitutionality*, *supra* note 46, at 199.

94. See ILL. REV. STAT. ch. 38, § 6-2(d) (1981).

95. One Illinois Senator stated that Illinois' new definition of mental illness is so broad and confusing that it would likely defeat the purpose of the bill. Senate Debate, *supra* note 13, at 128 (statement of Sen. Keats).

96. *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981) (Cieslik, J.).

97. Judge Cieslik read People's Instruction No. 12 which is contained in ILL. PATTERN JURY INSTRUCTIONS § 24-25.01 (1981). The instruction provides:

A person is insane and not criminally responsible for his conduct if at the time of the conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Abnormality manifested only by repeated criminal, or otherwise anti-social conduct, is not mental disease or mental defect.

People's Instruction No. 12, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981).

98. People's Instruction No. 13, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981).

99. People's Instruction No. 14, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981). For the definition of mental illness, see *supra* note 50.

the defendant mentally ill would not contradict finding him sane beyond a reasonable doubt.¹⁰⁰ After receiving this assurance,¹⁰¹ the jury returned a verdict of GBMI.¹⁰² In his motion for a new trial, the defendant argued that the GBMI amendments are unconstitutional because they fail to provide adequate standards for the jury accurately to distinguish between the concepts of mental illness and legal insanity.¹⁰³ The motion was denied and the case presently is being appealed.¹⁰⁴ Regardless of how *DeWit* is resolved on appeal, the fact remains that the statutory distinction between insanity and mental illness will continue to promote jury confusion and compromise.

Judicial Procedures

In addition to reducing the percentage of insanity verdicts, the statutory enactment of GBMI creates the need for pre-trial procedures designed to guard against erroneous findings of mental illness and guilt. For example, if the defendant pleads GBMI the court will be required to review the defendant's psychiatric report and determine whether there is a factual basis for the defendant's assertion of mental illness at the time of the offense.¹⁰⁵ This measure will prevent mentally healthy defendants from pleading GBMI in an effort to gain a favorable disposition. It is likely that the court will also be required to determine whether there is a factual basis to support the defendant's admission of guilt for the offense.¹⁰⁶ Together, these procedures will

100. The jury foreman, after repeating the apparently contradictory instructions, stated: [t]he jury will render a unanimous decision in favor of the second verdict [GBMI] if you can confirm our understanding that this verdict does not contradict the three propositions in (1)—[finding the defendant sane beyond a reasonable doubt] but essentially adds the qualification of mental illness.

Record at 1657-58, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981).

101. Telephone interview with Lorna E. Propes, *DeWit's* Defense Counsel (March 5, 1982).

102. *DeWit* was sentenced to 22 years imprisonment. *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981).

103. Defendant's Motion For New Trial at 3, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981). The defendant also submitted a memorandum arguing against the GBMI instruction because the offense occurred before the GBMI statute was enacted. The defendant argued, in part, that the GBMI verdict would "fundamentally and irrevocably work to defendant's disadvantage" because a finding of mental illness acts as an additional punishment placed upon the defendant with no corresponding mitigation in sentence. Defendant's Memorandum of Law In Opposition To The Guilty But Mentally Ill Verdict at 3-6, *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981).

104. *People v. DeWit*, No. 80 C 6347 (Criminal Court, Cook Co., Ill. Oct. 1, 1981), *appeal docketed*, No. 81-3019 (1st Dist. Ct. App., Dec. 7, 1981).

105. See ILL. REV. STAT. ch. 38, § 115-2(b) (1981). A plea of guilty but mentally ill may be accepted if the defendant has undergone a mental examination and waived his trial right, the judge has reviewed the psychiatric report, and the judge has held a hearing which establishes that defendant was mentally ill at the time of the crime. *Id.*

106. See *id.* § 115-2(a)(2). Instead of merely hearing evidence of the charge, the court must now "determine the factual basis for the plea [of guilty]." *Id.* Although this section was amended

aid in avoiding erroneous findings of guilt and mental illness, thus guarding against the possibility that the state's mental health facilities will be used to institutionalize psychologically healthy defendants and the state's correctional facilities used to institutionalize innocent defendants.

If the defendant chooses not to plead GBMI but instead pleads innocent and asserts the defense of insanity, to ensure proper jury instruction the court will have to distinguish carefully between evidence probative of insanity and evidence probative of mental illness. In Illinois, evidence of personality disorders, idiosyncratic behavior, and disturbed thinking is insufficient to justify a reasonable doubt of sanity.¹⁰⁷ The rationale behind this is that although the evidence may show that the defendant was mentally ill, it is insufficient to justify a reasonable doubt as to whether the defendant was able to appreciate the criminality of his conduct at the time of the offense.¹⁰⁸ The GBMI amendments, however, broadly define mental illness to include any "thoughts, moods, or behaviors" that impaired the defendant's judgment.¹⁰⁹ Because the amount of evidence required to prove impaired judgment is less than the amount required to prove insanity, this may result in a situation in which the evidence is sufficient to warrant a GBMI instruction but insufficient to warrant an insanity instruction.¹¹⁰

Sentencing Options

The most significant impact of the GBMI amendments undoubtedly will be in the area of sentencing. Prior to the enactment of the GBMI verdict alternative, Illinois' determinate sentencing procedures required trial courts to comply with statutory limits in sentencing defendants who pled or were found guilty of particular felonies.¹¹¹ With the enactment of GBMI, the courts

to include only those defendants who plead guilty, it will most likely be interpreted to include the GBMI defendant who pleads guilty. In addition, the GBMI plea will likely be interpreted to include other statutory and constitutional guarantees that accompany guilty pleas such as the requirement that a defendant must knowingly and voluntarily enter a plea of guilty. *People v. Weakley*, 45 Ill. 2d 549, 259 N.E.2d 802 (1970). See also ILL. REV. STAT. ch. 110A, § 402 (1981) (Supreme Court Rule 402 requires defendant to be admonished personally as to the nature and possible sentence for the charge, his right to plead not guilty, and the fact that his plea of guilty waives his right to trial).

In practice, however, this will not result in significant procedural changes because in the past Illinois courts have required trial courts to determine whether there was a factual basis for the defendant's guilty plea before it could accept the plea. See, e.g., *People v. Martin*, 58 Ill. App. 3d 633, 374 N.E.2d 1012 (1st Dist. 1978) (purpose for setting forth a factual basis for guilty plea is to protect defendant from pleading guilty to a charge he did not commit).

107. See *People v. Lono*, 11 Ill. App. 3d 443, 449, 297 N.E.2d 349, 354 (1st Dist. 1973) (citing numerous authorities).

108. *Id.*

109. ILL. REV. STAT. ch. 38, § 6-2(d) (1981).

110. In Michigan, however, the two instructions are given together. See 1 MICH. CRIMINAL JURY INSTRUCTIONS 7:8:02A (Supp. 1979).

111. See ILL. REV. STAT. ch. 38, § 1005-5-3(c)(2) (1981). This section sets out the minimum sentences that must be imposed for each class of crimes. Under this schedule, the imposition of probation is prohibited for the convictions of murder, attempted murder, Class X felonies

have been afforded greater sentencing discretion to fulfill their statutory duty of ensuring the appropriate disposition of GBMI defendants.¹¹² After a mandatory pre-sentence hearing,¹¹³ the court has two alternatives: (1) sentence the defendant as if he had been found guilty,¹¹⁴ or (2) sentence the defendant to probation, periodic imprisonment, or conditional discharge with the requirement that he participate in a treatment plan prescribed by the court.¹¹⁵ These sentencing alternatives are notable exceptions to Illinois' determinate sentencing law which prohibits probation for particular crimes.¹¹⁶

If the probation option is utilized, the statute gives courts discretion to develop and implement treatment plans that "reasonably assure the defendant's satisfactory progress" toward mental health.¹¹⁷ This option is likely to be chosen by trial judges who are cognizant of the limited treatment opportunities facing GBMI defendants in prison.¹¹⁸ With the probation option, however, one issue certain to arise is the extent to which trial courts may compromise the public's interest in safety by sentencing the GBMI defendant to probationary treatment instead of prison.

Finally, although the statute increases the court's sentencing options in many areas, a finding of GBMI necessarily precludes the jury from issuing the death sentence.¹¹⁹ Under current law, the existence of mental illness at the time of the crime is a mitigating factor that the jury must balance against aggravating factors in determining whether a defendant should be sentenced to death.¹²⁰ In view of the statutory treatment rights that underlie a GBMI

(defined at *id.* § 1005-5-3(c)(6)), violations of the Controlled Substances Act (*id.* ch. 56 1/2, §§ 1402 or 1407), the Cannabis Control Act (*id.* ch. 56 1/2, § 709), or repeated class two felonies within 10 years of a class one felony. Probation is also prohibited if the court finds the defendant to be a "habitual criminal" pursuant to ILL. REV. STAT. ch. 38, § 33B-1 (1981).

112. See ILL. REV. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (1981).

113. ILL. REV. STAT. ch. 38, § 1005-3-1 (1981) provides that "a defendant shall not be sentenced for a felony before a written pre-sentence report of investigation is presented to and considered by the court." *Id.*

114. *Id.* § 1005-2-6(a).

115. *Id.* § 1005-2-6(e).

116. The legislative intent to create these exceptions is even more apparent when Illinois' discretionary probation is compared with Michigan's mandatory requirement that GBMI defendants be sentenced as if they had been found guilty of the offense. Compare ILL. REV. STAT. ch. 38, § 1005-2-6(a) (1981) (the court may impose any sentence upon the defendant which could have been imposed if the defendant had been found guilty) with MICH. COMP. LAWS ANN. § 768.36(3) (West 1981) (the court must impose any sentence that could have been imposed had the GBMI defendant been found guilty).

117. ILL. REV. STAT. ch. 38, § 1005-2-6(e)(2) (1981). Although not an exclusive list, the statute provides authority for family supervision, police supervision, community adjustment programs, and outpatient care as examples of appropriate treatment plans. *Id.*

118. See *supra* notes 84-86 and accompanying text.

119. See ILL. REV. STAT. ch. 38, § 9-1(b) (1981). This section allows the jury to consider a sentence of death if (1) the victim was a peace officer, fireman, correctional employee, or witness, (2) if the defendant had been convicted of two previous murders, or (3) if the defendant committed the murder pursuant to a contract, while hijacking an airplane, or in the course of another felony. *Id.*

120. See *id.* § 9-1(c)(2). After finding at least one aggravating factor, the jury must consider

verdict, to order death as the GBMI defendant's treatment would not only be contrary to the legislature's objectives,¹²¹ but also would be morally reprehensible.

A final consequence of the Illinois GBMI amendments is that when a defendant is sentenced to prison, the Department of Corrections has greater statutory authority to provide psychiatric treatment than under prior law. Previously, prison officials were required to give psychiatric care only to prisoners who met the requirements of involuntary admission under the Mental Health Code.¹²² The GBMI amendments, however, provide for psychiatric treatment to GBMI defendants regardless of whether they are sufficiently mentally ill to meet the standard of involuntary admission under the Mental Health Code.¹²³ Thus, although a defendant's treatment opportunities are largely within the suspect discretion of prison officials,¹²⁴ the GBMI amendments do grant authority to provide psychiatric treatment for a class of mentally ill prisoners previously neglected by Illinois law.

SUGGESTED APPROACH

In order to effectuate the goals of the GBMI amendments, the Illinois courts must provide jurors with a clear distinction between a GBMI verdict and the verdict of insanity, thereby alleviating jury confusion and the tendency toward compromise verdicts that may potentially deprive legally insane defendants of an insanity verdict. Additionally, to avoid a potential violation of the defendant's due process rights, a hearing should be held to determine the defendant's mental condition at the time of sentencing rather than relying

mitigating factors to determine whether the death sentence is appropriate. One mitigating factor is if "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance although not such as to constitute a defense to prosecution." *Id.* If the jury determines unanimously that there are no mitigating factors sufficient to preclude the sentence of death, the court shall sentence the defendant to death. *Id.* § (g).

121. See *supra* note 14. Illinois Governor James R. Thompson, however, believes differently. After signing the GBMI Bill, Thompson suggested that a GBMI defendant could be sentenced to death as long as the defendant is "mentally right when you electrocute him." J. Shedd & K. Uhlmann, *Thompson Signs 'Guilty But Mentally Ill' Bill*, Chi. L. Bull., Sept. 17, 1981, at 1, col. 1.

122. ILL. REV. STAT. ch. 38, § 1003-8-5 (1981) requires the Department of Corrections to "ascertain whether any person committed to it may be subject to involuntary admission . . . or . . . judicial admission. . . ." *Id.* The Mental Health Code defines persons subject to involuntary admission as (1) mentally ill and reasonably expected to inflict serious physical harm upon himself or another in the near future, or (2) unable to provide for their basic needs. ILL. REV. STAT. ch. 91 1/2, § 1-119 (1981). The Mental Health Code further defines persons subject to judicial admission as (1) mentally retarded, and (2) reasonably expected to inflict serious physical harm upon himself or another in the near future. *Id.* § 4-500.

123. See ILL. REV. STAT. ch. 38, § 1005-2-6(b). Furthermore, the GBMI amendments require the Department of Corrections to "cause periodic inquiry and examination . . . concerning the nature, extent, continuance, and treatment of the defendant's mental illness." *Id.*

124. See *id.* § 1005-2-6(b), (c) (defendant will be provided such treatment and counselling as department deems necessary).

solely on a finding of mental illness at the time of the offense.¹²⁵ Finally, Illinois courts should utilize the GBMI treatment alternatives to their fullest extent and, if necessary, order state officials to provide adequate psychiatric treatment for GBMI defendants. Together, these safeguards should sustain the GBMI amendments against due process challenges and help fulfill the legislature's dual objectives of reducing erroneous insanity verdicts and ensuring adequate care for mentally ill offenders.

Because the GBMI instruction is warranted whenever the insanity instruction is given,¹²⁶ both instructions should be incorporated into a new insanity instruction that adequately distinguishes the concepts of mental illness and legal insanity. As demonstrated in *DeWit*, a verbatim reading of the GBMI statute and its vaguely defined use of the terms mental illness and insanity is wholly inadequate.¹²⁷ A new insanity instruction should be adopted which informs the jury of the probable disposition of the defendant under each alternative verdict.¹²⁸ One commentator has suggested the separation of the questions of legal insanity and mental illness through the use of a carefully drafted instruction.¹²⁹ This approach is consistent with the legislative intent underlying the Illinois GBMI amendments¹³⁰ because it aids the jury in separating the important concept of mental illness from legal insanity and informs the jury of the probable disposition of the defendant under the

125. *Accord* *People v. McLeod*, 407 Mich. 632, 658, 288 N.W.2d 909, 917 (1980) (implicit requirement in GBMI verdict that courts make a finding of the defendant's mental illness at the time of trial to avoid constitutional challenges).

126. *See supra* note 110 and accompanying text.

127. *See supra* note 96-104 and accompanying text.

128. In Michigan, the jury is instructed:

(1) If you find the defendant committed the act but was not criminally responsible at the time, then he is not guilty by reason of insanity. If you make such a decision, the defendant will be immediately committed to the custody of the Center for Forensic Psychiatry for a period not to exceed sixty days.

1 MICH. CRIMINAL JURY INSTRUCTIONS 7:8:08 (Supp. 1980).

129. *See Guilty But Mentally Ill, supra* note 46, at 488. The author proposes the following instruction to aid juries in distinguishing between insanity and mental illness:

If you find that the defendant did have a substantial capacity to understand the wrongfulness of his conduct or to act in accordance with the law you must find that the defendant was legally sane.

If you find the defendant legally sane and guilty you may then consider the question of mental illness. If you find that at the time of the alleged offense the defendant suffered from a substantial disorder of his thoughts or moods that significantly impaired his judgment, behavior, capacity to recognize reality, or ability adequately to deal with the demands of his day-to-day life, then you may find him guilty but mentally ill.

A defendant found guilty but mentally ill will be institutionalized and treated under the Department of Health until the sentence imposed by this court expires. If the defendant is cured before his sentence expires, he will be transferred to the Department of Correction for the remainder of his term.

Id.

130. For a discussion of the Illinois legislative intent, see *supra* notes 13 & 14 and accompanying text.

respective verdicts.¹³¹ It is suggested that the following instruction would clarify these distinctions:

Because the defense of insanity has been raised, you must now consider the question of whether the defendant is criminally responsible for his conduct. You must carefully consider the four verdicts that may be returned in the case. The verdicts guilty, guilty but mentally ill, not guilty by reason of insanity, and innocent each have different standards and each provide for a different disposition of the defendant.

(1) If you have a reasonable doubt as to whether the defendant committed the act or possessed the required intent to commit the offense [if applicable], you must find the defendant innocent. The court will then immediately release the defendant from custody.

(2) If you find beyond a reasonable doubt that the defendant committed the act and possessed the required intent to commit the offense [if applicable], you must consider whether, because of a mental illness, the defendant should not be held criminally responsible for his conduct. If you have a reasonable doubt as to the defendant's sanity at the time of the offense, you must find him not guilty by reason of insanity. A person is insane and not criminally responsible for his conduct if at the time of the offense, a mental illness caused the defendant to lack substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the law's requirements. Abnormality manifested only by repeated criminal, or otherwise anti-social conduct, is not a mental illness. If you find the defendant not guilty by reason of insanity, he will then be committed to the custody of the Department of Mental Health until the court determines the defendant is no longer dangerous to himself or others.

(3) If, however, you find beyond a reasonable doubt that the defendant did, at the time of the offense, have substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the law's requirements, you must find that the defendant was legally sane. If you find the defendant legally sane you may then consider separately the defendant's mental illness. If you find beyond a reasonable doubt that the defendant committed the offense, was legally sane but suffered from a substantial disorder of thought, mood, or behavior which impaired the defendant's judgment at the time of the offense, you must find the defendant guilty but mentally ill. A defendant found guilty but mentally ill may

131. Michigan courts are able to rely on the combined model GBMI and insanity instruction found in 1 MICH. CRIMINAL JURY INSTRUCTIONS 7:8:01 to 7:8:13. Instructions are given before trial to aid the jury in distinguishing between the concepts of mental illness and legal insanity. *Id.* at 7:8:01. In addition, the court fully instructs the jury as to the ultimate disposition of the defendant under each verdict. *Id.* at 7:8:08 - 7:8:10.

be sentenced to prison and will receive mental treatment if necessary. If the defendant's mental health is restored before his sentence expires, he will remain in the custody of the Department of Corrections for the remainder of his term. Alternatively, the court may sentence the defendant to probation and require the defendant to participate in a treatment plan ordered by this court.

(4) If you find beyond a reasonable doubt that the defendant committed the conduct, possessed the required intent to commit the offense [if applicable], and was legally sane, but you have a reasonable doubt as to whether the defendant was mentally ill at the time of the conduct, you must find the defendant guilty. The court will then impose the sentence required by law.

In addition to finding a GBMI defendant mentally ill at the time of the offense, Illinois courts should require a finding of mental illness at trial, at sentencing, or both, to avoid possible due process challenges.¹³² This could be accomplished by requiring the pre-trial report to include a statement of defendant's present mental condition¹³³ or by ordering a mental examination as part of the mandatory pre-sentence report.¹³⁴ Although the statute does not explicitly require this finding at the pre-trial or pre-sentence stages, such a procedure should be adopted to determine the defendant's need for psychiatric treatment.

Finally, although the GBMI amendments give seemingly broad discretion to judges and prison officials in determining what, if any, psychiatric treatment a GBMI defendant will receive,¹³⁵ Illinois courts should utilize the GBMI treatment provisions to their fullest extent, and order state officials to comply fully with the statute's requirements.¹³⁶ Indeed, without fulfilling the legislature's promise of psychiatric treatment,¹³⁷ the GBMI defendant receives little except the additional stigma of being labeled mentally ill. The failure to give the GBMI defendant adequate psychiatric treatment undermines the basic purpose for requiring the jury to distinguish between mentally ill and mentally healthy defendants—to provide rehabilitative psychiatric care for mentally ill defendants.

CONCLUSION

The GBMI amendments were drafted in response to specific instances of

132. *Accord* *People v. McLeod*, 407 Mich. 632, 658, 288 N.W.2d 909, 916-17 (1980) (prior to sentencing, a finding of defendant's present mental health must be made).

133. *Cf.* ILL. REV. STAT. ch. 38, § 115-6 (1981) (any defendant asserting the insanity defense at trial is required to submit to psychiatric examination upon motion by state).

134. *See id.* § 1005-3-1 to 1005-3-3 (although a psychological examination is one alternative for the court to utilize under pre-sentence procedures, it is not required to order the exam).

135. *See supra* notes 84-86 and accompanying text.

136. Such measures have been expressly approved under the Michigan statutes. *See People v. Sorna*, 88 Mich. App. 351, 362, 276 N.W.2d 892, 897 (1979).

137. The Illinois legislative history emphasizes the importance of adequate psychiatric treatment for GBMI defendants. *See supra* note 14.

insane defendants committing serious crimes, after being prematurely released from mental hospitals. Understandably, these events provoked considerable public outrage. As a result, the GBMI amendments were enacted in an attempt to reduce the number of persons who were erroneously found not guilty by reason of insanity and to ensure adequate psychiatric care for mentally ill defendants. Although these objectives are commendable, the legislation instituted to achieve these objectives is poorly conceptualized. First, the confusing distinction between mental illness and legal insanity may deprive some legally insane defendants of their right to an insanity verdict. Second, the GBMI defendant's right to psychiatric treatment is illusory due to the great degree of discretion afforded judges and prison officials in determining what, if any, psychiatric treatment a GBMI defendant will receive.

In interpreting and implementing the GBMI amendments, Illinois courts must attempt to clearly instruct jurors so as to avoid the confusion that may deprive legally insane defendants of an insanity verdict. Courts should also utilize the GBMI treatment alternatives to their fullest extent to provide adequate care for mentally ill defendants. Such interpretation can accomplish the legislature's objectives and remedy potential constitutional defects presently existing in the amendments.

The proper disposition of the mentally ill offender is a tremendous challenge for the Illinois legislature. This challenge, however, has not been adequately met by the GBMI amendments. The subtle distinctions created by the amendments do little more than create new legal fictions. Although this Note suggests possible interpretations for Illinois courts to utilize in an effort to implement the legislature's objectives, it is imperative that the legislature re-examine the problems associated with administering the insanity defense by addressing those problems directly, not by generating additional confusion in an already perplexing area of criminal practice.¹³⁸

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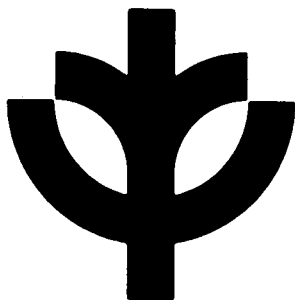
138. As Justice Cardozo aptly noted, "[i]f insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality." M. McCormick & D. Paull, *Illinois Issues*, Nov. 1980, at 13.

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